# SOCIO-LEGAL PERSPECTIVES ON INSTITUTIONAL RENOVATION

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**Law and its Discontents**

Since the inception of the welfare state in mid-19th century France and England, claims for equity, empowerment and entitlement have been couched in terms of law. These claims – for positive public policies translated into legally enforceable rights, for the creation of participatory processes of governance, for access to material and human resources, for dignity and empowerment – are understood to be an expression of the desire for personal and collective advancement characteristic of democratic societies.

Such claims frequently conflict with claims to be immune from state control or regulation through law, claims to have human affairs disposed of by the working of "spontaneous," non-governmental ordering mechanisms such as the marketplace, customary practices, or even religious authority. Freedom from state control, and latterly, from the burden of legal entitlements generated by it, is often characterized as the very essence of democracy. The notion of the Rule of Law was, for a century or more, understood to be a prescription for a form of democracy in which the state would be legally compelled to abstain from many of the most effective modes of regulatory action.

These contesting views are today coupled with another idea. Far from being seen either as a positive force of empowerment or as a bulwark against unwanted state action, the very notion of law – the vehicle by which such state action is most typically undertaken – is itself contested. For many, the perceived failure of the modern regulatory state amounts to a perceived failure of law itself.

Because law is everywhere in issue, there are extraordinary opportunities for socio-legal research. The general sense that law has failed is neither minor and confined to a few intractable arenas of human interaction, nor is it due to easily corrected errors of technique or procedure. State law often fails substantively; many governmental initiatives are unsuccessful and sometimes produce perverse consequences exacerbating the problems being addressed. State law also often fails procedurally; even when it succeeds in reaching appropriate substantive results, its mechanisms and processes are sometimes so cumbersome and alien that the desired legal solution remains inaccessible for those who are its purported

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beneficiaries. Finally, state law often fails symbolically; far from enhancing respect for the fundamental ideals of law and justice, legal activity may result in such ideals being contested or trivialized by polemical debate. Thus, not only have the great projects of social redistribution run up against the hard wall of budgetary constraint, they have generated inefficiencies, inequalities and unfairness. The clamour in certain circles for privatization, deregulation and smaller government is one reflection of this perception of failure.

Yet the widespread continuing faith in law and increased recourse to law is equally present. The fate of aboriginal peoples, on one account, is perceived to turn on their securing the constitutionally protected right to legislate for themselves, as a third order of government. Statutory enactment of an "Environmental Bill of Rights" is proposed as a strategy for better protecting the physical environment. Consumers, shareholders, tenants and minority language speakers seek legal protection, as do those disadvantaged by reason of their gender, race or class.

No programme of socio-legal scholarship can immediately resolve or reconcile these divergent views. However, it can bring into focus what has largely gone unnoticed: the co-existence of several spontaneous and structured state, para-state and non-state regimes of law. A better understanding of these diverse legal regimes is central to analyzing the successes and failures of attempts to use law to advance democratic values.

To date, most socio-legal scholarship has revealed a deep ambivalence about these competing perspectives. One line of research has focused on the tacit contextual influences that generate normativity, and the processes by which other normative regimes may reinforce, defeat or transform the implementation of state-centred legal strategies. This line of research is relatively agnostic about the power and virtue of state law and accepts the inevitability and legitimacy of other kinds of legal regimes.

An opposing tendency, focused on such instruments as the *Charter*,[1] has reiterated and reinforced belief in the capacities of state law. Such stipulative scholarship may be driven by the widely observed alienation of citizens from government, the force of populist demands for greater emphasis on process and participation, or growing discontent with the rising costs and declining satisfactions of the welfare state. Great emphasis is placed upon identifying and declaring legal rights and remedies, so as to ensure that the state and its institutions respond not just to bureaucratic and political imperatives, but also to the interests and advocacy of citizens, individually and collectively.

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[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

**The Agenda of Critical Legal Pluralism**

While neither total faith in nor total scepticism about state law is warranted, what seems odd is how seldom either is based on an understanding of what law is, what law does, how it succeeds and, especially, why it fails in particular contexts. Two factors that contribute to the perceived failure of law merit attention. First, the failure of particular instances of legal regulation are uncritically interpreted as a failure of law itself and of the legal enterprise in all its manifestations. Second, the complexity of achieving successful legal regulation has long been underestimated, in part because it is obscured by two dogmas of modernity: the view that the state is the central (if not exclusive) expression of the social contract, and the commitment to instrumental rationality as the paramount way of achieving social change through law. Law's failure is thus at least in part grounded in what law is (mis)understood to be.

If the impact of these two factors on our assessment of the regulatory failure of law is to be understand, a new way of conceiving the social reality of law – a new paradigm for socio-legal research, and a new paradigm for standard doctrinal legal analysis – is needed. The "Law in Society" initiative of the Canadian Institute for Advanced Research has adopted such a paradigm: critical legal pluralism. This approach has three root premises:

(1) there is a multiplicity of legal orders in every society,

(2) the legal order of the state is not necessarily central or dominant, nor is it ever independent of these other kinds of legal order,

(3) not every legal order necessarily reproduces the characteristics ascribed to state law.

Of course, the basic ideas of critical legal pluralism are not new. Historically, prior to the invention of the nation state and its presumed unitary legal order, legal pluralism was the dominant mode of legal analysis. But in the 20th century, legal pluralism has tended to be more the resort of sociologists and anthropologists than legal scholars. Until recently, scholars in the pluralist tradition tended to focus on exotic or pathological examples of the phenomenon.[2] This 20th century legal pluralism has also been preoccupied with showing the

[2]They acquired this focus by the study of such topics as the interaction of official and unofficial law in colonial settings in Africa or Polynesia, or the interaction of official law and the unofficial law of the urban ghetto (criminal organizations and street gangs), for example.

limits of state law in terms of its efficiency and legitimacy.[3] The laws of society (seen to be informal, pluralistic and decentralised) were thus opposed to the laws of political states (seen to be formal, unitary and centrally governed by the Rule of Law).

In the general context of modernity and the liberal legal project, the intellectual positions taken by legal pluralists, and especially by those concerned with its non-exotic and non-pathological instances, have frequently been considered to be regressive. They could not be reconciled with the dominant wisdom espousing values of democratic republicanism, societal reform through law and professional expertise – all legacies of a fidelity to Weberian postulates of legal-rational authority. Over the past decade, however, there has been a revival of interest in legal pluralism, to the point where it is now viewed as the most effective vehicle for interdisciplinary research in law, be this among anthropologists, sociologists, political scientists, geographers, historians and economists. Drawing on many of the insights of postmodernism, socio-legal scholars working in this field are now attempting to explore law as a discourse relating to power and knowledge systems, notably the professional knowledge system of state law, which is appropriated, refined and perfected by lawyers and courts.

Of course, in the context of legal pluralism it is easy to lose sight of official law or state law as the paradigmatic form of publicly acknowledged law in Canadian society, and, in so doing, it is easy to lose sight of the problem of power. After all, in modern states the legal order *is* the focus of fundamental concerns over legitimacy, access, transparency and enfranchisement. Issues of power cannot be addressed adequately if scholarly research is limited to the identification of competing official and unofficial legal regimes. Moreover, if the notion of law were totally detached from the state and demoted to the generic status of a mere normative system, it would be necessary to invent a new name for it, in order to comprehend the interaction between diverse normative systems – that is, internormativity. Just as the expression Law *and* Society research misstates the relationship among these various normative orders as one which opposes all of them to the official system, so too, to collapse the distinctive features of state normativity destroys criteria for assessing the interplay of power.

In the past, legal pluralists have tended to advance structuralist solutions – such as the concept of social control – as a means for distinguishing law from politics and economics. But none of these structuralist strategies helps to identify exactly what it is that is explicitly "legal" about this form of normative ordering. Critical legal pluralists argue that the best way to understand law is to begin with the generally agreed-upon central elements of state law – rules, concepts,

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[3]This involved demonstrating the prevalence of informal norms, or the pervasive presence of groups and communities that generate normative regimes mediating between individual and state.

methodologies, procedures, institutions – a value structure. From these central elements, one must then reconstruct a sociological self-description of legal regimes. This self-description captures the movement from structure to process, from norm to action, and from jurisdiction to legitimation in socio-legal research. The discourse of justification within these different legal orders can then be used as the criterion for isolating the individuality which meaningfully separates one from the other, and which permits the official legal order to display its distinctiveness.

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Socio-legal research no longer requires any introduction to Canadian scholars, nor need it now feel obliged constantly to defend its premises and objectives. But recognition and legitimation are just preliminary steps to its flourishing. The development and refinement of an intellectual framework within which such research may be productively pursued are the next tasks on the socio-legal scholarly agenda: in this endeavour the interaction and reiteration of critical legal pluralism promise to be central.